IN THE SUPREME COURT OF THE UNITED STATES

State of Kansas, Petitioner,	)	
vs.	)	Case No. 14-452
Sidney Gleason Respondent,	)	

Motion for Leave to Proceed In Forma Pauperis

Comes Now the Respondent, Sidney Gleason, by counsel undersigned, and moves this Court for leave to proceed in forma pauperis. In support of this motion Respondent would inform this Court:

1. That he has no funds with which to pay the necessary fees and costs of this action.

2. That he was determined to be an indigent in accordance with K.S.A. 22-4501 *et seq.* and entitled to appointed counsel on appeal on August 28, 2006. On that date the Kansas Capital Appellate Defender Office was appointed to represent him and he was, in accordance with Kansas law, allowed to pursue his direct appeal to the Kansas appellate courts without the payment of docketing fees, attorney fees or any other costs. (See attached order of appointment.) He has remained indigent since that time.

WHEREFORE, your Respondent prays that his request for leave to proceed in forma pauperis be granted.

Respectfully submitted:

Sarah Ellen Johnson
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785-368-6587
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Attorney for Respondent Sidney Gleason

IN THE TWENTIETH JUDICIAL DISTRICT
DISTRICT COURT, BARTON COUNTY, KANSAS
CRIMINAL DEPARTMENT

FILED
06 AUG 28 P 2:20
CLERK OF THE DISTRICT COURT

THE STATE OF KANSAS, Plaintiff	)	
vs.	)	04 CR 52
SIDNEY J. GLEASON, Defendant	)	

ORDER APPOINTING APPELLATE COUNSEL

ON this 28th day of August, 2006, the Court hereby appoints Rebecca Woodman of the Capital Appellate Defender Office to represent the above-named individual for appellate purposes in accordance with K.S.A. 22-36014 (b)(1) and K.S.A. 22-4505 (a).

IT IS SO ORDERED.

Honorable Hannelore Kitts
District Court Judge, Barton County

PREPARED BY:

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DISTRICT COURT BARTON SEAL COUNTY GREAT BEND, KANSAS

STATE OF KANSAS } ss
BARTON COUNTY
I hereby certify that the foregoing is a true copy of the record on file in this court and cause.
Clerk of the District Court
Date August 28 2006
Deputy Clerk of District Court

No. 14-452

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS PETITIONER

VS.

SIDNEY J. GLEASON RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kansas

---

BRIEF IN OPPOSITION

Counsel for Respondent

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CAPITAL CASE

QUESTIONS PRESENTED

REASONS WHY THE PETITION SHOULD BE DENIED

Question Number I

a. There is no Eighth Amendment controversy in this case. The Kansas Supreme Court's holding is based on the particular provisions of Kansas law, and requires that juries be properly instructed under that law.

b. The decision of the Kansas Supreme Court rests on an independent and adequate state ground: the penalty phase instructions in this case, read together as a whole, misled the jury into believing that, contrary to provisions of state law, the Respondent bore the burden of proving mitigating circumstances beyond a reasonable doubt.

c. Because the decision of the Kansas Supreme Court is based on Kansas law, not the Eighth Amendment, there is no real conflict between this decision and any other decision of any state court of last resort

d. The error identified by the Kansas Supreme Court in this case is unlikely to occur again, because the required language has been incorporated into the Pattern Instructions for Kansas.

LIST OF PARTIES

The parties to this case are as stated in the caption, Sidney Gleason, petitioner, and the State of Kansas, respondent. In the courts below, petitioner was referred to as appellant-defendant and the respondent was referred to as appellee-plaintiff.

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BRIEF IN OPPOSITION

Respondent, Sidney J. Gleason, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

STATUTES INVOLVED

This is a supplement to the Petitioner's section on Constitutional and Statutory Provisions involved:

K.S.A. § 21-4624 provides in relevant part:

> (c) In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements.

and

> (e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole.

STATEMENT OF THE CASE

Respondent Sidney Gleason was convicted of capital murder, along with lesser counts. He was sentenced to death by a jury. The Kansas Supreme Court affirmed Respondent's capital murder conviction but reversed his death sentence, finding that the jury was not instructed as they should have been about mitigating circumstances.

REASONS WHY THE PETITION SHOULD BE DENIED

Question Number I

a. There is no Eighth Amendment controversy in this case. The Kansas Supreme Court's holding is based on the particular provisions of Kansas law, and requires that juries be properly instructed under that law.

The Petitioner argues to this Court that Certiorari is appropriate because the Kansas Supreme Court found that the Eighth Amendment requires an affirmative instruction to penalty phase jurors that mitigating circumstances need not be proven beyond a reasonable doubt in order to be weighed against aggravating circumstances. The Court made no such finding and Petitioner misreads the decision in *State v. Gleason*, 329 P.3d 1102 (Kan. 2014). Conspicuously absent from Petitioner's argument is the Kansas Supreme Court's discussion of, and reliance on, the relevant Kansas statute, K.S.A. § 21-4624(e) [now re-codified and in effect as K.S.A. § 21-6617(e)] in the *Gleason* decision.

The Kansas Supreme Court discussed the Eighth Amendment requirement that a sentencer not be precluded from considering relevant mitigating evidence, 329 P.3d at 1147, but did not base its decision on the Eighth Amendment. The Court specifically acknowledged this Court's statement in *Walton v. Arizona*, 497 U.S. 639, 649-651(1990) *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002), that the Eighth Amendment does not create any constitutional requirements as to how or whether a capital jury should be instructed on the burden of proof for mitigating circumstances. *Gleason*, 329 P.3d at 1147. The Court then focused on the particular requirements of Kansas law, distinguishing the Kansas statute from the statute in question in *Walton*:

> Kansas' capital sentencing statute differs distinctly from the statute at issue in Walton, and that distinction is critical to our analysis here. Namely, while K.S.A. 21–4624

> requires the State to prove aggravating circumstances beyond a reasonable doubt, the statute is silent as to any burden of proof for mitigating circumstances. K.S.A. 21–4624(e); see also [*Kansas v. Marsh*, 548 U.S. 163, 173 (2006)] (contrasting Kansas' statute, which places no evidentiary burden on capital defendants, with Arizona's statute, which requires capital defendants to prove mitigating circumstances by a preponderance of the evidence).
>
> As the United States Supreme Court recognized, "[t]his distinction operates in favor of Kansas capital defendants." 548 U.S. at 173. Notably, [*State v. Kleypas*, 40 P.3d 139 (Kan. 2001)]' first statement-that any mitigating circumstance instruction must inform the jury that mitigating instructions "need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt," **both preserves the statute's favorable distinction** and protects a capital defendant's Eighth Amendment right to individualized sentencing by ensuring jurors are not precluded from considering all relevant mitigating evidence. *Kleypas*, 40 P.3d at 268.
> ...
> **Because K.S.A. 21–4624 expressly burdens the State with proving the existence of aggravating circumstances beyond a reasonable doubt but places no evidentiary burden regarding the existence of mitigating circumstances on the defendant** beyond the burden of production, we reiterate our holding in *Kleypas* and [*State v. Scott*, 183 P.3d 801 (Kan. 2008)] that capital juries **in Kansas** must be informed that mitigating circumstances need not be proven beyond a reasonable doubt. *Gleason*, 329 P.3d at 1147 (emphasis added).

The Kansas Supreme Court could not have been more clear that the holding in this case relied on its interpretation of a Kansas statute. This Court stated in *Smith v. Phillips*, 455 U.S. 209, 221 (1982), "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." The decision of the Kansas Supreme Court, which holds that Kansas law requires an affirmative statement regarding the burden of proof, makes no pronouncements regarding federal constitutional requirements, thus presents no questions of federal constitutional dimension and the Petition for a Writ of Certiorari should be denied.

b. The decision of the Kansas Supreme Court rests on an independent and adequate state ground: the penalty phase instructions in this case, read together as a whole, misled the jury into believing that, contrary to provisions of state law, the Respondent bore the burden of proving mitigating circumstances beyond a reasonable doubt.

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If the same judgment would be rendered by the state court after this Court corrects its views of federal law, the review would amount to nothing more than advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125–126 (1945). "When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*, if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman*, 501 U.S. at 730.

The decision of the Kansas Supreme Court in this case was based on the former K.S.A. § 21-4624(e). The Court determined that there was a reasonable probability that the instructions in this case, considered as a whole, misled the jury as to the burden of proof regarding mitigating circumstances under Kansas law, resulting in a misapplication of that statute. Therefore, the decision of the Kansas Supreme Court in this case would be the same, regardless of its view of the requirements of the Eighth Amendment.

This Court has held that the individual states have a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Individual states are free to allocate a burden of proof to the defendant to prove mitigating circumstances, as long as the prosecution continues to bear the burden of proving every element of the offense charged or the aggravating

circumstances. *Walton*, 497 U.S. at 650. The Kansas law in effect at the time of Respondent's trial required that the prosecution prove aggravating circumstances beyond a reasonable doubt, but imposed no such requirement on the defendant, with regard to mitigating circumstances:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. K.S.A. § 21-4624(e).
>
> As previously noted, this Court has recognized:
>
> "...the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital defendant. This distinction operates in favor of Kansas capital defendants." *Marsh*, 548 U.S. at 173 (2006).

An instruction to penalty phase jurors that they must find that the defendant had proved a mitigating circumstance beyond a reasonable doubt before weighing it against any aggravating circumstances would be contrary to Kansas law. Likewise, potentially reversible error would occur if the instructions, when read as a whole, could mislead the jurors into that conclusion. The Kansas Supreme Court found that occurred in this case, and that finding is well-supported by the record.

The jury received the following instruction regarding mitigating circumstances:

> **INSTRUCTION NO. 7**
> **SIDNEY J. GLEASON**
> **MITIGATING CIRCUMSTANCES**
>
> Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree or moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.
>
> In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

> The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State had proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.
>
> ...
>
> You may further consider as a mitigating circumstance any other aspect of the defendant's character, background or record, and any other aspect of the offense which was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance found to exist. (Record on Appeal, Vol.I, pp.753-754).

The instruction addressing mitigation did not state that mitigating circumstances need not be proven beyond a reasonable doubt, even though this trial occurred years after the *Kleypas* decision was issued. In contrast, the beyond a reasonable doubt burden of proof was stated many times, often in conjunction with the consideration of mitigating circumstances. (Record on Appeal, Vol. I, pp.753, 755, 757, 759,762; Instructions 7, 8, 10, 12, Verdict Form). While those instructions did not say mitigating circumstances had to be proven beyond a reasonable doubt, they repeatedly put the jury into the mindset of considering what had been proven beyond a reasonable doubt when considering mitigating circumstances.

The Court found that because the only burden mentioned was the "beyond a reasonable doubt" burden, the jurors may not have understood that they could consider any mitigation that they found existed, even if not proved beyond a reasonable doubt. *Gleason*, 329 P.3d at 1148. Although the Court noted that instructions that prevent jurors from giving meaningful effect or a reasoned moral response to mitigating evidence implicate a defendant's right to individualized sentencing under the Eighth Amendment, those same instructions would likewise prevent jurors from following the provisions of state law as expressed in K.S.A. 21-4624(e).

The Kansas Supreme Court will not reverse a case based on instructional error if the instructions properly and fairly state the law as applied to the facts of the case and if they could not reasonably have misled the jury. *State v. Scott*, 183 P.3d 801, 810, Syl. ¶ 32 (Kan. 2008). Reversal in this case was founded on the court's view that the instructions as a whole created a substantial probability that reasonable jurors could have believed that they were required to find the existence of a mitigating circumstance beyond a reasonable doubt in order to consider it in the weighing process. Whether or not this is contrary to the Eighth Amendment, it is contrary to the Kansas statutory provisions for the consideration and weighing of aggravating circumstances against mitigating circumstances. Kansas law provides the basis of the Court's decision. This Court defers to the decisions of state courts on issues of state law, *Bush v. Gore*, 531 U.S. 98, 112 (2000), and should deny the Petition for a Writ of Certiorari in this case.

c. Because the decision of the Kansas Supreme Court is based on Kansas law, not the Eighth Amendment, there is no real conflict between this decision and any other decision of any state court of last resort.

As stated in the preceding arguments, the decision rendered in this case is a decision based on the particular provisions of Kansas law. Thus Kansas is not in conflict with any other jurisdiction, whether that jurisdiction is interpreting its own state law, or the United States Constitution.

The Petitioner first claims conflict with the Supreme Court of California, citing *People v. Souza*, 277 P.3d 118, 156-157 (Cal. 2012). Even if one could read into the Kansas Supreme Court's decision a pronouncement that the Eighth Amendment requires an affirmative instruction on the burden of proof, the California cases cited in the Petitioner's brief do not engage in any Eighth Amendment analysis regarding instructions on the burden of proof. *Souza* rejected the

defendant's Eighth Amendment burden of proof claim stating the instruction sought would have been duplicative, citing *People v. Avila*, 208 P.3d 634, 670 (Cal. 2009), as modified (Aug. 12, 2009). In *Avila*, the court rejected the claim without analysis, citing *People v. Samayoa*, 938 P.2d 2, 47 (Cal. 1997) *as modified on denial of reh'g* (Aug. 13, 1997). In *Samayoa*, the court rejected the claim without analysis, citing *People v. Breaux*, 821 P.2d 585, 604-605 (Cal. 1991). In *Breaux*, the court did not consider the burden of proof claim. The issue presented in *Breaux* was whether the trial court should have affirmatively instructed the jurors that they were not required to unanimously find a mitigating circumstance in order to consider it. *Id.* Additionally, the California court was interpreting capital sentencing statutes that were substantially different from those of Kansas. Unlike the Kansas statute in question, the California statutes do not require that aggravating circumstances be found beyond a reasonable doubt and neither the defense nor the prosecution carries a burden of proof during the penalty phase. *People v. Welch*, 976 P.2d 754, 797 (Cal. 1999). While the California court in *Welch* did conclude that the jury in that case would not have mistakenly inferred that one jury instruction stating that aggravators must be proved beyond a reasonable doubt could also mean that standard applied to mitigating factors, it hardly gives rise to a split of authority on a point of federal constitutional law that the Kansas court reached a different conclusion when considering a different set of instructions..

The issue in *Dawson v. State*, 637 A.2d 57 (Del. 1994) was not whether the Eighth Amendment requires that the jury receive an affirmative instruction regarding the burden of proof for mitigating circumstances. Rather, the question before the court was whether the instructions in that case were unconstitutionally ambiguous. *Id.* at 64. Additionally, the death penalty statute in question in *Dawson* is different from the Kansas statute as it requires the

prosecution to convince the sentencer that aggravating circumstances found to exist outweigh the mitigating circumstances "by a preponderance of the evidence." *Id.* at 63.

There was no Eighth Amendment claim or analysis in the Indiana case cited by the Petitioner, *Matheney v. State*, 688 N.E.2d 883 (Ind. 1997). And the case concerned a significantly different statute. Under the Indiana statute, mitigating circumstances must be proven by a preponderance of the evidence, and the court found that an instruction to that effect would have been appropriate. *Id.* at 902. However, because there was nothing in the *Matheney* jury instructions that would have led the jury "to a misunderstanding" regarding the burden of proof, there was no error in failing to give the instruction. *Id.*

State v. Jones, 474 So. 2d 919, 932 (La. 1985) did not address the Eighth Amendment, presumably because there was no Eighth Amendment claim. The defendant merely requested an instruction that the jury need find mitigating circumstances only by "any substantial evidence" or by a "preponderance of the evidence."

Similarly, in *Green v. State*, 934 S.W.2d 92 (Tex.Crim.App. 1996), there was no discussion of the Eighth Amendment, because the defendant did not claim, in that case, that the Eighth Amendment required an affirmative instruction to the jury that mitigation need not be proved beyond a reasonable doubt. In fact, the defendant raised no claim (constitutional or not) that an affirmative instruction was required. Rather, the defendant claimed that the instructions might have misled the jurors into believing "that a death sentence was appropriate unless the State proved "beyond a reasonable doubt" that a life sentence was appropriate in view of Appellant's mitigating circumstances." *Id.* at 107.

The Kansas Supreme Court has not departed from other jurisdictions on point of federal constitutional law, but rather on a matter of state law. Kansas simply requires greater clarity in its

jury instructions based on the requirements of a Kansas statute than other states require based n their own, different statutes. Because there is no true conflict on a point of federal law between the decision of the Kansas Supreme Court and that of any other jurisdiction, this Court should deny the Petition for a Writ of Certiorari.

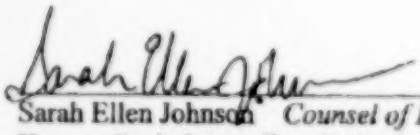
d. The error identified by the Kansas Supreme Court in this case is unlikely to occur again, because the required language has been incorporated into the Pattern Instructions for Kansas.

The Kansas Supreme Court first held in *State v. Kleypas*, 40 P.3d 139, 268 (Kan. 2001) *overruled on other grounds*, *State v. Marsh*,102 P.3d 445 (Kan. 2004), that in a capital sentencing proceeding, "... any instruction dealing with the consideration of mitigating circumstances should state (1) they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt and (2) mitigating circumstances do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision." Soon afterwards, Kansas' pattern instruction on mitigating circumstances was amended to clarify that jurors need not be unanimous on mitigating circumstances, but failed to include the language that mitigating circumstances need not be proven beyond a reasonable doubt. *Gleason*, 329 P.3d at 1145. Since that time, the PIK instruction on mitigating circumstances, PIK Crim. 4th 54.050, has incorporated both of *Kleypas*' recommended statements and correctly instructs the jury that "[m]itigating circumstances need not be proved beyond a reasonable doubt." *Gleason*, 329 P.3d at 1146. Because the pattern instruction now contains the correct language under the *Kleypas* decision, this issue is unlikely to arise in the future, and the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For all these reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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